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No. 99-1537

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BORDEN, INC., FLAV-O-RICH, INC., McARTHUR DAIRY, INC., THE SOUTHLAND CORPORATION and T.G. LEE FOODS, INC.,

Petitioners,

v.

MORTON'S MARKET, INC. and J&J PRODUCE & DELI, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Neither corporate respondent has a parent corporation and no publicly held company owns 10% or more of the stock of either respondent.

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2 P. *Areeda and H. Hovenkamp, Antitrust Law*, ¶ 338 (rev'd ed. 1995) 9

Respondents Morton's Market, Inc. and J. & J. Produce and Deli, Inc. ("plaintiffs" or "respondents") respectfully request that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (the "Petition") submitted by Borden, Inc., Flav-O-Rich, Inc., McArthur Dairy, Inc., The Southland Corporation and T.G. Lee Foods, Inc. ("defendants" or "petitioners") to review a judgment of the United States Court of Appeals for the Eleventh Circuit which reversed an order of the United States District Court for the Middle District of Florida granting petitioners' motion for summary judgment.

COUNTERSTATEMENT OF THE CASE

Petitioners are dairies which conducted business, *inter alia*, throughout the state of Florida during all or part of the period between 1970 and 1992. In May, 1992 another dairy, Gustafson's Dairy, Inc. ("Gustafson's") pled guilty to a one count information charging it with conspiring with unnamed co-conspirators to fix, maintain and stabilize the price of milk to commercial customers in the state of Florida. *See* R11-26 (Ex. A). The newspaper articles reporting Gustafson's plea were the first public reports of commercial price fixing by a dairy in Florida. Gustafson's was sentenced in August, 1992. Plaintiffs' suits followed in 1993.

The record evidence provides details of the conspiracy, including evidence that the Gustafson's unnamed co-conspirators included petitioners herein. In addition, the record is filled with evidence that petitioners fraudulently concealed their price-fixing scheme from the public for two decades. *See, e.g.*, R9-243 (Ex.4 at 41, 47-48); R9-243 (Ex. 6 at 25-26, Ex. 7 at 41-4).

In addition to conspiring to fix commercial prices, petitioners were also illegally rigging bids for contracts to supply milk to schools throughout Florida. In mid-1987, the State of Florida and the federal government began investigations into school milk bid rigging and, in February, 1988, the State filed a civil suit against some of the petitioners and other dairies. R9-243 (Ex. 37). The State's complaint and the attendant publicity surrounding the investigation were silent as to petitioners' commercial price-fixing activities. *Id.*

In this action, petitioners moved for summary judgment on statute-of-limitations grounds, arguing that plaintiffs' suit was untimely as it had not been filed within four years of the bid-rigging publicity. By order dated October 30, 1997, the district court granted petitioners' motions. It held that the newspaper articles regarding the school milk bid-rigging scheme constituted, as a matter of law, notice to commercial customers of petitioners' price-fixing conspiracy. (Petition at 37a-38a). Although the district court acknowledged that the record contained evidence that petitioners had fraudulently concealed the conspiracy, it determined that such facts need not be addressed because plaintiffs had not investigated their claims after the school milk bid-rigging articles appeared. (Petition at 39a-40a; *see also* 41a, n.15). The district court suggested that plaintiffs should have first sued the dairies and then conducted discovery to "formulate[] the basis for their current action." (Petition at 40a-41a).

On December 20, 1999, a panel of Eleventh Circuit unanimously reversed the district court's grant of summary judgment. The court of appeals held that, in "holding that notice of bid-rigging constituted notice to plaintiffs of possible price-fixing, the district court resolved a question

of fact against them in violation of Rule 56." (Petition at 16a (footnote omitted)). The court of appeals further held that, even if it were undisputed that plaintiffs were on notice that defendants were fixing their prices, defendants had the burden, as moving parties, to demonstrate that an investigation by plaintiffs would have uncovered adequate ground for filing suit. (Petition at 18a-19a). The court of appeals found that petitioners had not met this burden. This petition followed.

SUMMARY OF ARGUMENT

The issues raised in the petition present no novel or unique questions of constitutional or statutory interpretation worthy of review by this Court. The decision of the court of appeals turned on a rich factual record, is firmly rooted in the precedents of this Court, follows a long and unbroken line of authority in the Eleventh Circuit, and is fully consistent with the case law in other circuits. The alleged "conflicts" which the defendants strive to create are nonexistent.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Conflict With This Court's *Celotex* Decision Or Other Relevant Decisions Of Courts Of Appeals

Defendants' argument that the Eleventh Circuit applied a different summary judgment standard than that articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) is simply wrong. This attempt to craft a conflict between the decision below and *Celotex* is premised on a flawed interpretation of *Celotex*.

In *Celotex*, plaintiff had alleged that her husband's death had resulted from exposure to asbestos manufactured or distributed by numerous defendants. One defendant moved for summary judgment, asserting that plaintiff had failed to produce evidence that her husband was exposed to its products. The central question before this Court was whether, under Rule 56, the moving party was required to come forward with affidavits or other affirmative proof to support its motion on an issue where plaintiff had the burden of proof at trial.

This Court held that "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." 417 U.S. at 323. From this holding, defendants claim that the Eleventh Circuit should have excused them from the initial burden of pointing to undisputed facts in the record entitling them to summary judgment on the issue of fraudulent concealment of the alleged conspiracy. (*See* Petition at 7-8). This position is insupportable.[1]

In *Celotex*, this Court did not modify the burden on the moving party to establish the absence of a disputed material fact on an issue which the non-moving party had the burden of proving at trial. It confirmed that

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1. Furthermore, it was the existence of genuine issues of material fact in the record that was fatal to defendants' summary judgment motion — not a purported error in determining which party had the burden of pointing to such facts.

> a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323.

Here, the Eleventh Circuit specifically cited and applied the *Celotex* standard. (Petition at 14a) ("On a motion for summary judgment, however, the moving party always bears the initial burden of pointing out the undisputed facts which entitle it to judgment as a matter of law.") For the defendants to have met their initial burden on the fraudulent concealment issues, they needed to point to undisputed facts in the record which demonstrated that plaintiffs "either knew of their claim or had notice sufficient to prompt them to investigate and that, had they done so diligently, they would have discovered the basis for their claims." (Petition at 14a). They could not do so and do not claim otherwise. Thus, after thoroughly reviewing the record, the court of appeals correctly found that defendants were not entitled to summary judgment as the record contained genuine issues of material fact.

First, the Eleventh Circuit found that the record contained factual disputes regarding defendants' concealment of the conspiracy. (Petition at 16a, n.11).[2]

2. One such factual dispute was actually highlighted by one of the defendants. (*See* Petition at 16a, n.11). Additionally, even the district court conceded that some of the acts in the record "could

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As to the question of notice, an issue rarely resolvable on summary judgment, the court of appeals rejected the defendants' argument that the newspaper articles regarding their bid-rigging scheme established as a matter of law that plaintiffs were on notice of commercial price fixing violations.

> None of [the cases cited by defendants], however, holds that notice of one wrong by a defendant triggers a duty for potential plaintiffs to investigate all other potential wrongs the defendant might be committing, and we are unwilling to say that it does as a matter of law. Notice that sellers have come up with a method of extracting undeserved profit from the government does not, as a matter of law, supply notice to the private buyer that the sellers have come up with another method to get into his pocket. Whether notice of rigging bids to schools for milk contracts should have excited these plaintiffs to inquire about possible price-fixing as to milk retailers is a question for the jury and may ultimately depend on credibility choices.

(Petition at 18a) (footnote omitted). Finally, as to plaintiffs' due diligence, defendants could point to no evidence in the record that an investigation would have led to the discovery of adequate ground for filing suit and, as the Eleventh Circuit

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cause me to conclude that a factual question of actual concealment is present." (Petition at 41a, n.15). The district court, however, concluded that it "need not determine the extent of defendants' concealment" because it had decided that plaintiffs had not acted diligently. (Petition at 40a, n.14).

noted, defendants "did not . . . address this issue at all in their briefs." (Petition at 19a).[3]

As set forth above, the court of appeals applied the same summary judgment standard as required by Rule 56 and *Celotex* and found, correctly, that defendants had failed to point to undisputed facts in the record entitling them to summary judgment.

II. The Eleventh Circuit's Holdings That A Plaintiff Is Not Charged With Knowledge Of His Claim Until He Should Have Discovered The Basis For Such Claims And That A Plaintiff Is Not Required To Conduct A Fruitless Investigation Do Not Conflict With Decisions Of This Court Or Other Decisions Of Courts Of Appeals

Defendants also attempt to manufacture a conflict between the Eleventh Circuit's holding that the statute of limitations is tolled until a plaintiff has "actual or constructive knowledge" of its claim and the standard established by this Court in *Wood v. Carpenter*, 101 U.S. 135, 141 (1879) (citing *Kennedy v. Greene*, 3 Myl. & K 722), that "[w]hatever is notice enough to excite attention and put the party on guard and call for inquiry, is notice of every thing to which such inquiry might have led." (Petition at 12-13). There is no conflict at all. In both cases a party is charged with notice of only the information that an inquiry would have revealed.

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3. The court of appeals also pointed out that defendants had asserted, in the context of arguing that their denials of price-fixing to the Florida Attorney General were not acts of concealment because that investigation was required by law to be secret, that "the information [from the government's inquiry] never entered the public domain." (Petition at 20a, n.15).

Defendants further assert that the Eleventh Circuit's holding that a party is not precluded from asserting the fraudulent concealment doctrine to toll the statute of limitations where that party did not conduct a fruitless investigation conflicts with settled law that fraudulent concealment is unavailable to a plaintiff who has not conducted an investigation even where such an investigation would not have uncovered a basis to file suit. (Petition at 15-16). Defendants have misstated the precedents of this Court and other courts of appeal, all of which are consistent with the decision below.[4]

In *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-196 (1997), this Court held that, as in antitrust cases, the fraudulent concealment doctrine in RICO cases embodied a due diligence requirement.[5] The Court cited with approval Professor Areeda's formulation of the fraudulent concealment doctrine in the antitrust context: "[T]he concealment requirement is satisfied only if the plaintiff shows [at trial] that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense."

4. This issue is academic, or at best premature, since it only arises where, unlike here, a plaintiff is found to have had sufficient information to put him under a duty to investigate. Accordingly, since the Eleventh Circuit held that inquiry notice here is a question for the jury, petitioners are asking this Court to rule on an issue that may never be reached. This alone is sufficient for a denial of *certiorari*.

5. Most decisions interpreting due diligence, including *Klehr*, are factually distinguishable from the case below. They involve the situation where, unlike here, a factual basis to sue was discoverable to the plaintiff who investigated. In *Klehr*, for example, plaintiff needed only to open the door on his silo to learn of the defective condition forming the basis for his suit. *See* 521 U.S. at 185.

2 P. *Areeda and H. Hovenkamp, Antitrust Law*, ¶ 338, at 152 (rev'd ed. 1995). This Court also cited as settled authority *Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1533 (5th Cir. 1988) where the Fifth Circuit held that "the statute of limitations is tolled only until such time as the plaintiff, exercising reasonable diligence, could have discovered the facts forming the basis for the claim." Each of these formulations charge the plaintiff with only the knowledge he would have obtained though a reasonable investigation and make no suggestion that due diligence requires a party to conduct an investigation doomed to failure.

The court of appeals decisions cited by defendants are consistent with this doctrine. The Fourth Circuit's holding in *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 128 (4th Cir. 1995) is in explicit agreement with the Eleventh Circuit. ("[I]t is possible for a plaintiff to satisfy [the due diligence requirement] without demonstrating that it engaged in any specific inquiry. . . . [I]f reasonable further inquiry would have not revealed the basis for the antitrust claim, the plaintiff's claim is not time-barred.")[6] The Third, Fifth, Sixth and Ninth Circuits have not addressed the issue directly, but are in implicit agreement. In *Wills Trucking, Inc. v. Baltimore & Ohio R.R. Co. (In re Lower Lake Erie Iron Ore Antitrust Litig.)*, 998 F.2d 1144, 1179 (3d Cir. 1993) the Third Circuit stated, as petitioners quote, that the exercise of due diligence must be

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6. Petitioners cite *Charlotte Telecasters Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976) in support of their position. However, that case merely confirms that there is a requirement for due diligence but does not treat the consequences of failing to investigate where an investigation would not have uncovered a basis to sue. Accordingly, it did not inhibit the Fourth Circuit from adopting the same rule as the Eleventh Circuit now has.

shown. However, defendants have omitted the language preceding the quote that tolling ceased when facts sufficient to sue "were nonetheless discovered or could with reasonable diligence have been discovered notwithstanding concealment. . . ." (*Id.*) (quoting *Pinney Dock & Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1179 (6th Cir. 1988)). The Third Circuit went on to hold that "[w]hat the [plaintiffs] knew about the railroads' rate-making should reasonably have made them aware of a basis for asserting the very claim now being raised." *Id.*[7] Likewise, in *Eichman v. Fotomat Corp.*, 880 F.2d 149, 158 (9th Cir. 1989) the Ninth Circuit specifically held that "[t]hrough the exercise of due diligence [plaintiff] could have discovered [a factual basis to sue]."

Finally, the First Circuit has not as yet taken a position. In *Berkson v. Del Monte Corp.*, 743 F.2d 570, 574 (1st Cir. 1976), the court of appeals held that there was no concealment, but it stated in dictum that "[i]f [plaintiff] wished to bring an action based on his suspicions, he was under a duty to exercise due diligence in investigating whether the suspicions were well founded." *Id.* Nowhere did the First Circuit state that the failure to investigate was fatal even if an investigation would have produced no basis to sue.

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7. The Fifth Circuit formulation in *Texas v. Allan Constr. Co.* is set forth at p. 9, *supra*.

The decision below is consistent with settled law. Further, defendants have not presented an "extraordinary case" that would merit the exercise of jurisdiction, and, as such, defendants' request for review is premature.

CONCLUSION

In light of the foregoing arguments, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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